

Administering the Estate of the Deceased after a Grant of Probate has been Obtained - A Fact Sheet

I have obtained a grant of Probate. What does it mean?

It means that the Supreme Court has given you permission (as the executor appointed in the Will of the deceased) to deal with the assets of the deceased, that is, collect all the assets of the deceased, pay off all the debts and distribute the assets of the deceased as outlined in the Will.

Do you mean that I do not have the power to deal with the assets of the deceased before obtaining a grant of Probate? I, as the executor appointed in the Will of the deceased, should not distribute the assets of the deceased before obtaining a grant?

The answer is not straightforward.

If all the assets of the deceased are owned by the deceased as joint tenant with someone else, an application for a grant of Probate is not required. You as the executor can undertake all actions/tasks necessary to transfer the assets to the surviving joint tenant.

If the deceased owned a small bank account, superannuation and a car, there are a few things that you can do. You as the executor can negotiate with the bank for the release of funds to the beneficiaries in the Will without a grant of Probate. Just be aware that different banks have different policies about the release of deceased estate funds.

Note that if the fund in the bank account of the deceased is less than the prescribed amount it can be paid to the deceased person's spouse or next of kin - Section 139 of the *Administration Act 1903* (WA). The prescribed amount varies from time to time.

In relation to the car, you may approach the Department of Transport and apply to have the vehicle transferred to the name of the beneficiary without a grant.

If there is a superannuation entitlement in the name of the deceased, a dependant of the deceased can apply to the superannuation fund to have the funds released without a grant of Probate.

In the event that a grant of Probate is required, although you should not deal with the assets of the deceased until a grant is obtained, there are certain things you can do beforehand.

You need to make sure that the assets of the deceased are kept insured. Where possible, you as the executor have a duty to make sure that the assets of the estate are maintained and preserved, for example ensuring bank interest is paid on term deposits prior to their withdrawal, keeping the assets of the estate insured and so on.

There are certain assets of the deceased that you, as the executor, can deal with before a grant of Probate is obtained. For example, there may be perishable items of the estate that have to be dealt with immediately or animals and farm products that need your immediate attention.

Once a grant of Probate is obtained, you will be reimbursed for any reasonable expenses incurred when administering the estate. Make sure you keep receipts for all expenses you have incurred on behalf of the estate.

If there are assets in the sole name of the deceased, then these assets, such as bank accounts should be frozen. If the deceased has, in their sole name, loans or mortgage payments due, the financial institutes should not try to get someone else (for example, a beneficiary or a spouse) to pay the debts of the deceased.

It is advisable to send a certified copy of the death certificate to notify all the financial institutes, utility service providers, and shires that the person has passed away.

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On receiving such notification all the agencies which have received the notifications should then cease deducting payments from the account of the deceased person, such as taking out mortgage payments from the deceased's account or making a direct debit from the account of the deceased.

Are you saying that I, as the executor, am not personally liable for the debts of the deceased when the debt is in the sole name of the deceased?

If you were the guarantor or surety on the loan that the deceased had, then you may be liable — this depends on the agreement between parties.

If the debt is in the sole name of the deceased, the financial institutes cannot ask the spouse or beneficiaries of the deceased or the executor to make payments or settle the loan of the deceased. Once the debtor is dead, the debt is a debt of the estate, not the debt of the surviving spouse or beneficiaries of the estate.

As the executor of the estate am I entitled to be paid for the time I spend in administering the estate of the deceased?

Unless the will-maker has stated in the Will that the executor is to be paid, the executor — unless the executor is a lawyer — cannot invoice the estate for the time spent administering the estate. Note that you will be reimbursed for any expenses you have incurred.

For example, you will be reimbursed the filing fees you pay when filing the application for a grant of Probate.

If the will-maker has not made any provision for the executor to be paid, but all the beneficiaries of the estate agree, the executor can be paid for their time and effort in administering the estate.

As an executor can I distribute the estate as I think fit?

No, you do not have the power to do this.

If the beneficiaries agree, then the distribution of the estate can be changed by parties signing a Deed of Family Arrangement.

If there is no agreement and a party wants to change the terms of the Will, then Supreme Court action has to be commenced. You as the executor will be joined as a party to such court action and the estate funds will be used for you to defend/respond to the court action.

How do I deal with the assets of the deceased once I have obtained a grant of Probate?

Collect all the assets of the deceased and make a list of all the assets and liabilities (that you know) of the deceased.

Maintain the assets of the deceased - keep the assets of the deceased in good repair and pay any insurance due (you will be reimbursed later). You, as the executor, are required to maximise the returns of the estate.

What is the first task I have to attend to?

The first task would be to get a few certified copies of the Probate parchment. This will include a copy of the Will attached at the back of the parchment.

Take or send the certified copies of the Probate parchment to the financial institutes where the deceased had accounts. The accounts can now be unfrozen. You can then open a new estate account and transfer the funds into the estate account.

What is an estate account?

An estate account is an account opened in the name of the deceased, for example, the account name would be noted as "the Estate of John Smith", not an account under the name John Smith.

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Must the estate account be opened in the same bank where the deceased had an account?

No, that is not the case.

You can open an estate account in the same bank where the account is in, or open an estate account in another bank. Once an estate account has been opened you can transfer the funds in the frozen account into the newly opened estate account.

What is the next thing to do?

Write to all agencies which are holding assets of the deceased. Include a certified copy of the Probate parchment and request that the funds to be transferred to the estate account.

Let us take this example: If in the Will the deceased has stated that an asset — such as shares — has to be transferred to an individual beneficiary, then this needs to be attended to. If the deceased has not gifted the shares to anyone, then the shares have to be sold and the funds deposited into the estate account.

It is important to keep a record of all the transactions you carry out on behalf of the estate of the deceased.

Let us assume that the deceased had not specified which of his three beneficiaries gets the deceased's home, but a beneficiary wants to buy the house. Is there any option for this to take place?

If the beneficiaries agree, then the beneficiaries, and you as the executor (having obtained a grant of Probate) can enter into a Deed of Family Arrangement to change the terms of the Will.

Note that a Deed of Family Arrangement can only be entered into after a grant of Probate has been obtained.

At CAB we do draft Deeds of Family Arrangement.

How do I deal with a property registered in the sole name of the deceased?

If the will-maker has gifted the property to a beneficiary, when finalising the estate, the asset can be transferred to that beneficiary. You as the executor can organise this yourself or you can have this task attended to by a settlement agent. The fee for the service of the settlement agent comes out of the estate account.

If the property is not gifted to anyone, then the property has to be sold. This is a task you can do yourself or have a real estate agent deal with this.

How do I deal with the debts of the deceased?

All debts of the deceased should be paid first before the estate is distributed. But do not attend to this immediately after the grant of Probate is obtained.

Paying off all the debts of the estate and distributing the assets of the deceased to nominated beneficiaries should be the last task you attend to as the executor.

It is advisable, in the first instance, to place a Section 63 Notice.

What is a Section 63 Notice?

A Section 63 Notice is a notice that the executor can place in the Death Notice section of the West Australian newspaper and in the Government Gazette. The Notice would state that you have obtained a grant of Probate and that you are now the executor of the estate.

If the deceased owed anyone a debt, the creditor must come forward within one month of the Section 63 Notice being placed to put forward their claim. If a creditor does not come forward within that timeframe, then the executor will distribute the assets in accordance with the terms of the Will.

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Is there any other thing I have to attend to?

There is no death tax in Australia but the estate may be liable for income tax or capital gains tax. It is advisable to contact a tax agent or an accountant to find out if the estate has to submit a final income tax return or has any other tax liability.

If there is a need to submit a final income tax return, get this done and pay any estate tax liability due. If the tax agent or the accountant advises that there is no need to do a final income tax return, get this information in writing from the tax agent or accountant.

If you as the executor have finalised the estate, and a tax debt has to be paid, the tax debt has to be settled using your personal funds if the beneficiaries refuse to pay the tax debt.

The estate may be liable for capital gains tax or other taxes. Note that there may be tax liabilities for assets sold two years after the death of the deceased.

Can an interim distribution be made to the beneficiaries?

You can make an interim distribution but you need to be satisfied that funds will be available to pay the debts of the estate first.

What if there are more debts than assets in the estate?

The estate is a bankrupt estate. Get legal advice on how to administer a bankrupt estate.

Is there a timeframe for finalising the estate?

There is no timeframe for finalising an estate. The timeframe depends on how simple or complex the estate's finances are. It is advisable to wait for six months after obtaining a grant of Probate before distributing the estate of the deceased.

What is the reason for the six months' wait before finalising the estate?

If anyone wants to challenge the Will, the timeframe for doing this is six months from the grant of Probate.

Note that a challenge to the Will can be commenced after the six months' timeframe if the challenger can demonstrate a reasonable excuse for not commencing action within the timeframe. If the Supreme Court is satisfied with the reason/s the Supreme Court can give leave for an application to be made out of time.

How do I make the final distribution?

The estate must be distributed as set out in the Will.

Once all the debts of the estate have been paid, prepare a final statement for each beneficiary. Outline the assets of the deceased and all the expenses incurred. Then itemise the entitlements of each beneficiary as outlined in the Will.

State that statements or invoices are available evidencing the expenses incurred. If a beneficiary is satisfied with the statement, ask that they sign the statement and return the same to you with their bank details. Once you have received the signed statement, a final distribution of funds can be made into the bank account of each beneficiary.

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